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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

PIATTI RESTAURANT COMPANY, L.P.,

Plaintiff and Respondent,

v.

ANDORIA, LLC,

Defendant and Appellant.

C079923

(Super. Ct. No. SCV0035262)

Defendant Andoria, LLC (Andoria) appeals from a judgment following a motion for entry of stipulated judgment and writ of possession by plaintiff Piatti Restaurant Company, L.P. (Piatti). Andoria contends: (1) the trial court erred in granting Piatti's motion for relief from dismissal in a related case, *Andoria, LLC v. Gaube, et al*, Placer County Superior Court case No. SCV0034500 (*Gaube* action); (2) the trial court erred in granting Piatti's motion to retain jurisdiction in the *Gaube* action; and (3) the trial court erred in granting the motion for entry of stipulated judgment and writ of possession in the instant action. We conclude that we lack jurisdiction to consider the first two arguments,

as Andoria chose not to appeal from any ruling in the *Gaube* action. With respect to the third argument, we perceive no basis for concluding the trial court erred. Accordingly, we affirm.

I. BACKGROUND

Stamas Corporation (Stamas), a nonparty to this appeal, entered into a commercial lease agreement with Piatti for restaurant property in Roseville in August 1997. Piatti subleased the property to another nonparty, Alamo Restaurant Group LLC (Alamo), in December 2010. Alamo assigned the sublease to Andoria in September 2011.

Andoria commenced the *Gaube* action on April 11, 2014. Andoria's complaint asserts causes of action for fraud, negligent misrepresentation, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, breach of contract, violation of the Unfair Competition Law, malicious prosecution, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage against Donald Gaube (Alamo's managing member), Alamo, and Piatti. Although Piatti was named as a defendant in the *Gaube* action, it was never served with the summons and complaint.

Stamas, Piatti, and Andoria entered into a settlement agreement in the *Gaube* action in July 2014. As relevant here, the settlement agreement contemplated that Andoria would receive a five-year extension of the lease term, on the condition that Andoria: (1) deposit \$80,000 into a liquor license escrow within 30 days; (2) pay Piatti \$70,000 for furniture, fixtures, and equipment within 90 days; and (3) open a restaurant to the public within 90 days.

The settlement agreement provides: "All parties expressly agree that, in the event of a breach of this Settlement Agreement, Piatti and any other non-breaching party may file an Unlawful Detainer action in the Superior Court of the County of Placer for the possession of the subject property in which this Settlement Agreement and the attachments hereto shall serve as a basis for a stipulated judgment in said action. It is

further agreed that in the event of a breach of this agreement, [Piatti] may enter this Settlement Agreement as a Stipulated Judgment and seek to enforce the Stipulated Judgment by issuance of a writ of immediate possession after (1) giving [Andoria] . . . 30 day's [*sic*] written notice of monetary breach, or (2) 60 day's [*sic*] written notice of a non-monetary breach, if [Andoria] . . . fails to comply with the provisions of paragraphs 1 through 8 above or otherwise breaches the [Lease] or Sublease." The settlement agreement attached a Judicial Council unlawful detainer form complaint to be used for this purpose.

The settlement agreement further provides: "All parties expressly further agree that it is their intent that this Settlement Agreement is to be accepted by the Superior Court in connection with the above-referenced Unlawful Detainer complaint to be filed in the event of a breach as provided herein and enforced pursuant to the provisions of California Code of Civil Procedure § 664.[6] which states: [¶] '664.6. If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.' " Andoria filed a request for dismissal of the *Gaube* action as to Piatti with prejudice on August 26, 2014.

Piatti filed an unlawful detainer complaint against Andoria in the instant action on September 29, 2014. The Judicial Council form complaint alleges a breach of the settlement agreement, and seeks entry of the stipulated judgment and issuance of a writ of possession.

Piatti filed an ex parte application for entry of stipulated judgment and issuance of writ of possession in the instant action on October 10, 2014. Andoria opposed the application, arguing, inter alia, that the trial court lacked jurisdiction to enforce the settlement agreement on a summary basis because (1) the settlement agreement had been

entered in the *Gaube* action, which had been dismissed, and (2) the settlement agreement did not provide for, and the parties did not request that, the trial court retain jurisdiction to enforce the agreement. The trial court denied Piatti's ex parte application.

Piatti filed a motion for entry of stipulated judgment and issuance of writ of possession in the instant action on October 23, 2014. The motion asserts that Andoria breached the settlement agreement by failing to deposit \$80,000 into the liquor license escrow, failing to pay Piatti for furniture, fixtures, and equipment, and failing to open a restaurant to the public on the premises. Andoria opposed the motion, arguing, again, that the trial court lacked jurisdiction to enforce the settlement agreement on a summary basis under Code of Civil Procedure section 664.6 because the parties did not request that the court retain jurisdiction to enforce its terms.

The trial court denied the motion, stating, "Plaintiff's motion for entry of stipulated judgment is denied as plaintiff has failed to make a sufficient showing to establish the proper legal basis for the court to enter a stipulated judgment, presumably pursuant to [Code of Civil Procedure section] 664.6, in this new legal action based upon a settlement agreement reached in a separate action."

Piatti then filed a motion for relief from dismissal in the *Gaube* action. Specifically, the motion sought to set aside the dismissal pursuant to Code of Civil Procedure section 473, subdivision (b) for the purpose of allowing Piatti to make a general appearance to request that the trial court retain jurisdiction to enforce the settlement agreement pursuant to Code of Civil Procedure section 664.6. The motion was accompanied by a declaration explaining that the loss of jurisdiction was the result of Andoria's request for dismissal with prejudice of Piatti, which was, in turn, due to the mistake, surprise, and/or excusable neglect of its counsel. Andoria opposed the motion, arguing that Piatti was not a party to the *Gaube* action, and, therefore, could not seek relief from dismissal. The trial court granted the motion by order dated January 22, 2015. Piatti then filed a motion to retain jurisdiction in the *Gaube* action to enforce the

settlement agreement pursuant to Code of Civil Procedure section 664.6. The trial court granted the motion, over Andoria's opposition.

Piatti then filed a motion for entry of stipulated judgment and issuance of immediate writ of possession in the instant action. The motion asserted that Andoria breached the settlement agreement by failing to make timely deposits into the liquor license escrow, failing to pay Piatti for furniture, fixtures, and equipment, and failing to open a restaurant to the public pursuant to the terms of the agreement. The motion was supported by a declaration from one of Piatti's attorneys attesting to the circumstances surrounding the alleged breach and averring that Andoria regularly paid rent late, requiring Piatti to serve three day notices to pay or quit.

Andoria opposed the motion, arguing, as it does on appeal, that: (1) Piatti waived forfeiture of the lease by accepting rent; (2) the trial court was barred from granting the motion by Civil Code sections 1492 and 3275; and (3) the trial court should set aside any forfeiture of the lease pursuant to Code of Civil Procedure section 1179. The opposition acknowledged that Andoria failed to comply with the deadlines for depositing money into the liquor license escrow or paying Piatti for the furniture, fixtures, and equipment. The opposition also acknowledged that Andoria failed to comply with the deadline for opening a restaurant to the public. However, the opposition averred that Andoria tendered payments for the liquor license and furniture, fixtures, and equipment on January 14, 2015, (some five and three months after the deadline) and March 11, 2015 (some seven to five months after the deadline), both of which had been rejected. The opposition also averred that Andoria was current on the rent, and would suffer a significant loss of time and money if forced to relocate. The trial court granted the motion by order dated June 25, 2015.

The trial court entered the stipulated judgment for unlawful detainer and issued a writ of possession in the instant action on July 9, 2015. Andoria filed a notice of appeal in the instant action, identifying only the judgment and writ of possession as amended by

a subsequent motion for attorneys' fees. Andoria did not file a notice of appeal in the *Gaube* action, and did not identify either the order granting the motion for relief from dismissal or the order granting the motion to retain jurisdiction in the *Gaube* action in the notice of appeal filed in the instant action.

II. DISCUSSION

Andoria argues that: (1) the trial court erred in granting Piatti's motion for relief from dismissal in the *Gaube* action; (2) the trial court erred in granting Piatti's motion to retain jurisdiction in the *Gaube* action; and (3) the trial court erred in granting the motion for entry of stipulated judgment and writ of possession in the instant action. As we shall discuss, the first and second contentions are not properly before us, and the third lacks merit.

A. *Notice of Appeal and Appealability*

Andoria purports to challenge the order granting Piatti's motion for relief from dismissal and the order granting Piatti's motion to retain jurisdiction in the *Gaube* action. However, Andoria's notice of appeal does not identify the *Gaube* action, let alone any judgment or order entered therein. We cannot tell from the record before us whether judgment has been entered in the *Gaube* action and, though neither party addresses the issue, the challenged orders do not appear to us to be appealable. (See generally Code Civ. Proc., § 904.1; see *Veliscescu v. Pauna* (1991) 231 Cal.App.3d 1521, 1522 ["Established California decisional law provides that no appeal lies from an order granting a motion to vacate a default upon which no default judgment has been entered"].)

Our jurisdiction is limited in scope to the notice of appeal and judgment from which an appeal is taken. (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 846.) Although we must liberally construe notices of appeal (Cal. Rules of Court, rule 8.100(a)(2)), “ ‘ ‘ a notice of appeal will not be considered adequate if it completely omits any reference to the judgment [or order] being appealed.’ ” [Citation.]” (*Colony Hill v. Ghamaty* (2006)

143 Cal.App.4th 1156, 1172.) “The rule favoring appealability in cases of ambiguity cannot apply where there is a clear intention to appeal from only part of the judgment or one of two separate appealable judgments or orders.” (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47.)

Here, Andoria’s notice of appeal seeks review of only one judgment: The judgment in the instant action entered on July 9, 2015. The notice of appeal does not say anything about the *Gaube* action, and does not offer any indication that Andoria was trying to appeal from any order or judgment in the *Gaube* action. (Cf. *D’Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361-363 [court liberally construed notice of appeal containing wrong case number of another case previously dismissed by appellant but properly referring to order being challenged]; *Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1248-1249 [court liberally construed notice of appeal to encompass order erroneously filed in another case].) Even construing the notice of appeal liberally, it cannot be read to encompass an appeal of any order in the *Gaube* action. And even assuming arguendo that it could be so construed, Andoria fails to establish that the challenged orders are appealable. We therefore dismiss Andoria’s purported challenges to the orders entered in the *Gaube* action for lack of jurisdiction, and confine our review to the judgment in the instant action, to which we now turn.

B. Enforceability of Settlement Agreement

Encouraging voluntary settlement of litigation is “the strong public policy of this state.” (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1359.) Code of Civil Procedure section 664.6 promotes this policy by providing a summary procedure for enforcement of a settlement agreement, obviating the need to file a new lawsuit. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.) “It is for the trial court to determine in the first instance whether the parties have entered into an enforceable settlement.” (*Osumi v. Sutton, supra*, at p. 1360.) The trial court’s factual findings on a motion to enforce a settlement are subject to a substantial evidence standard of review.

(*Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162.) We review de novo the application of Code of Civil Procedure section 664.6 to undisputed facts. (*Ibid.*)

Andoria challenges the trial court's determination that the parties entered into an enforceable settlement agreement on several related grounds, all of which depend, to one degree or another, on the notion that equity abhors a forfeiture. First, Andoria argues that Piatti waived the right to declare a forfeiture of the lease by accepting late payments of rent. We need not linger long over this contention. Although Andoria directs our attention to cases holding that the acceptance of late rental payments may amount to waiver of the breach and preclude forfeiture of the lease (see, e.g., *Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal.435, 440-441; and see *Miller v. Reidy* (1927) 85 Cal.App.757, 760), these cases have no relevance here, where we are concerned with the enforceability of the settlement agreement, and not the underlying lease. Whatever merit Andoria's lease-based arguments may have had earlier in the litigation, they are no longer relevant now, and we need not consider them.¹

Second, Andoria argues the trial court should not have enforced the settlement agreement, but should have instead exercised its equitable powers to extend Andoria's time for performance to avoid a forfeiture under Civil Code section 1492, as time was not expressly declared to be of the essence in the agreement.² We are not persuaded. We review the trial court's determination that Andoria was not entitled to equitable relief

¹ We note, however, that the lease, which was binding on Andoria pursuant to the terms of the settlement agreement, contains a broad "antiwaiver" provision, specifying that no covenant or condition of the lease can be waived except by written consent of the landlord.

² Civil Code section 1492 provides: "Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime."

under Civil Code section 1492 for abuse of discretion. (*Conforti v. Dunmeyer* (1962) 209 Cal.App.2d 41, 43; *Benedict v. Calkins* (1937) 19 Cal.App.2d 416, 420.) No abuse of discretion appears on the record before us.

Although Andoria tendered various checks to Piatti at various times, the trial court could reasonably conclude that Andoria's tenders were far "too little, too late." Andoria tendered a check to Piatti for the liquor license escrow on or about September 17, 2014, the last day of the 30 day cure period.³ Piatti forwarded the check to the escrow officer, who subsequently reported that the check was returned for insufficient funds. Andoria also represented that funds had been transferred into the liquor license escrow by wire transfer; however, the escrow officer reported that no such funds had been deposited.

Andoria tendered another pair of checks on January 14, 2015. One of the checks, for \$77,040, was made payable to the escrow company, ostensibly for the liquor license deposit. However, the check came nearly five months after the original deadline, and four months after the cure period. The second check, for \$60,000, was made payable to Piatti, ostensibly for the furniture, fixtures, and equipment. However, that check came nearly three months after the original deadline, and two months after the cure period. Both checks reflected amounts other than the amounts specified in the settlement agreement, and both were tendered more than three months after Piatti filed the unlawful detainer complaint in the instant action. That Andoria failed to meet any of its obligations under the settlement agreement, and then waited months to tender replacement checks, suggests that the original defaults were either willful or the product of gross negligence—a supposition reinforced by Andoria's pattern of paying rent late.

³ Andoria contemporaneously tendered a second check, ostensibly for the liquor license escrow, which was made out to Piatti. Piatti did not negotiate the second check as the settlement agreement specified that the money was to be deposited directly into escrow.

Either way, the trial court could reasonably conclude that Andoria was not entitled to equitable relief under Civil Code section 1492.

Third, in a related vein, Andoria argues the trial court should have exercised its equitable powers to grant relief from forfeiture under Civil Code section 3275.⁴ We review the trial court's denial of relief under Civil Code section 3275 for abuse of discretion (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1064), and assume without deciding that the loss of an option to renew a lease can constitute a forfeiture in some circumstances. (See *Holiday Inns of America, Inc. v. Knight* (1969) 70 Cal.2d 327, 330, 328-329 [recognizing that "the time within which an option must be exercised . . . cannot be extended beyond that provided in the contract [because] [t]o hold otherwise would give the optionee, not the option he bargained for, but a longer and therefore more extensive option," but holding that the trial court should have granted relief from forfeiture under Civ. Code, § 3275 for an optionee who timely paid three of five \$10,000 installments for option to purchase real property, but paid the fourth installment one day late]; but see *Bekins Moving & Storage Co. v. Prudential Ins. Co.* (1985) 176 Cal.App.3d 245, 253 [suggesting that the loss of an option to renew a lease can never constitute a forfeiture because, "[i]n order for there to be a 'forfeiture' there must be some right or vested interest involved. An option is merely an offer"].) Even so assuming, the trial court could reasonably conclude that Andoria was not entitled to equitable relief under Civil Code section 3725 for the reasons stated above.

⁴ Civil Code section 3275 provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

Finally, Andoria argues the trial court should have granted relief from forfeiture under Code of Civil Procedure section 1179.⁵ “ ‘Under [Code of Civil Procedure] section 1179, the court in balancing the equities should take into consideration the circumstances of the case, the hardship, if any, to the lessee from the forfeiture, the hardship, if any, to the lessor from relieving the lessee from the forfeiture, the willful or other character of the breach, and then use its best discretion in determining whether relief will be granted. Its action will not be upset unless there is a clear showing of abuse of discretion.’ ” (*Thrifty Oil Co. v. Batarse* (1985) 174 Cal.App.3d 770, 777; see also *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, *supra*, 195 Cal.App.3d at p. 1064 [“ ‘The matter of granting or denying such an application is one which lies so largely in the discretion of the trial court that it would require a very clear showing of an abuse of such discretion to justify a reversal of the order made thereon’ ”].) No such showing has been made here.

The trial court was presented with substantial evidence that Andoria failed to comply with any of the conditions for exercising the option to renew the lease, giving Piatti the right to entry of the settlement agreement as a stipulated judgment and enforcement of the judgment through the issuance of a writ of possession. Although Andoria likens the issuance of the writ of possession to a forfeiture, that was what the

⁵ Code of Civil Procedure section 1179 provides: “The court may relieve a tenant against a forfeiture of a lease or rental agreement, whether written or oral, and whether or not the tenancy has terminated, and restore him or her to his or her former estate or tenancy, in case of hardship, as provided in [Code of Civil Procedure] Section 1174. . . . [¶] An application for relief against forfeiture may be made at any time prior to restoration of the premises to the landlord. The application may be made by a tenant . . . or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant”

We note that Andoria does not appear to have filed a verified petition for relief under Code of Civil Procedure section 1179. However, we assume without deciding that the trial court could have granted such relief on its own motion.

parties contemplated when they entered the settlement agreement, and the trial court could reasonably conclude that the hardship Piatti would suffer if the agreement were not enforced was greater than the hardship Andoria would suffer if it were, particularly in light of Andoria's long history of defaults. Andoria has failed to show that the trial court abused its discretion by failing to grant relief from forfeiture on its own motion under Code of Civil Procedure section 1179.

III. DISPOSITION

The judgment is affirmed. Respondent Piatti Restaurant Company, L.P. shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/S/

RENNER, J.

We concur:

/S/

ROBIE, Acting P. J.

/S/

BUTZ, J.